IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

W. G. SIMPSON and S. D. SIMPSON.

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendants in Error.

MOTION OF PLAINTIFFS IN ERROR FOR A REHEARING.

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May it Please the Court:

Come now the plaintiffs in error, by their attorney, William H. Atwell, and petition for a rehearing and show that the opinion and judgment rendered herein on February 7, 1916, is erroneous and the cause should be re-heard, for the following reasons, to-wit:

I.

Because the authorities cited by this Honorable Court in support of its judgment that the trial court was correct in overruling the motion to quash and the demurrers and exceptions to the indictment which were

based on an alleged duplicity therein are not responsive to nor do they support the conclusion that a single count containing more than one offense is not duplicitous.

The authorities cited in 22 Cyc. 380, arise from the consideration of cases which treat of acts of commission or omission as forming component parts or preliminary stages of a single transaction, as illustrated by the case of United States v. Fero, 18 Fed. 901, which is based upon a statute declaring it to be offensive for a person to receive anything of value under a threat of informing **or** as a consideration for not informing.

In the case from the Eighth Circuit, Ackley v. United States, 200 Fed. 221, the question of duplicity was not before the court. The indictment in that case was being attacked because it did not state a crime, and the court, in passing upon that demurrer, merely, in an abbreviated paragraph, held that the indictment must follow the statute creating the offense, and then, by way of dictum, observed that the exception to that rule was, that, if a statute denounced several things as a crime, the different things thus enumerated being connected by the disjunctive, **or**, the pleader must connect them by the conjunctive, **and**, before evidence could be admitted as to more than one act, and then continued to observe that if the pleader pursued this course, he could not use the word **or** in such an indictment, because then it would be bad for uncertainty, but must use the word **and** which would not render it bad for duplicity.

In the case of Tiberg v. Warren, 192 Fed. 464, the Court of Appeals for the Ninth Circuit was considering an indictment which charged a breaking and an attempting to break, and was considering the question of removal merely, and there held, in a paragraph thirteen lines long, that where the Statute makes the commission of different acts an offense and such acts are stated disjunctively in the statute, two or more or all of such acts may be embraced in a single count in the indictment, but they must be set forth conjunctively; that is to say, where the word **or** appears in the statute the word **and** should be employed in the indictment, and concludes with this phrase, "especially is this true where the indictment or complaint is challenged in a removal proceeding."

Against these authorities, which I respectfully contend are not in point, for the reason that the matter at issue here was not at issue there, are the cases of Billingsley v. United States (Eighth Circuit), 178 Fed. 659, and the case of United States v. Norton, 188 Fed. 259. In the latter case the identical question before the Court was there before the court, and an indictment, drawn precisely as is the instant indictment, was held to be duplicitous upon preliminary motion and therefore quashed.

It is respectfully submitted that it is an elementary rule of pleading that an indictment or information must not, in the same count, charge the defendant with two or

more distinct and separate offenses and in case it does so, it is bad for duplicity, if the offenses were inherently repugnant or not different stages in one transaction, or involve different punishments. 22 Cyc. 376, and cases there cited.

The issuance, therefore, of a certificate of deposit with intent to injure, and the issuance of a certificate of deposit with the intent to defraud, are not different stages in one transaction, but are two separate and distinct offenses, neither of which is related to nor dependent upon the other; neither of which is an omission connected with an act of commission, but both stand out separate and distinct, entirely complete and evidently directed by the law maker to correct a separate and distinct species of abuse.

In Wharton's Criminal Pleading and Practice, pp. 244-254, and in 1st Bishop's Criminal Procedure, pp. 443-440, it is laid down as axiomatic that two or more offenses may, under proper circumstances, be joined in one information; but it must be in separate counts. Each count, as a general thing, should embrace one complete statement of a cause of action, and one count should not include distinct offenses—at least, distinct felonies. There are many prominent exceptions to this rule, but, as this case is not within the exceptions, they need not be noted.

To the same effect is State v. Gibson, 111 Mo. 92; Slocum v. People, 90 Ill. 274; Henderson v. People, 124

Ill, 607. And so, too, even Section 1024 of the Revised Statutes of the United States, which reads as follows:

> "When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment, in separate counts."

I recognize, may it please the Court, that in this day of so-called judicial reform, what I am now contending for, here, seems to be a superlative nicety, but superlative niceties are never quite so vital, nor valuable, as when they are given life for the purpose of protecting innocence from death or the prison; and the facts in this case, though, as I readily recognize, have been passed upon by a jury, must be viewed with an intense rigidity before the defendants can be convicted; hence, they are entitled to the same rigidity in the construction of that which the sovereignty alleges against them. A man who gets $2,500 and sends that money, together with a letter, to the bank, for which he got it, and afterwards, within a week of the time that he ascertains that a mistake has been made, again pays the money, together with all charges and interest, is not such a very bad man, after all. Surely not a man who should lie in prison five years; and, therefore, in order to save him from such disgrace, when he has

harmed no one, every well-marked path of the law, so marked by judicial ascertainment, should be resorted to and claimed and recognized before punishment is suffered to be pronounced.

I therefore take the liberty of commending to the Court a careful reading of the case of United States v. Norton, 188 Fed. 265, which is the first and only case that I have been able to find which deals with the point directly at issue, and wherein a judge of great learning determined the identical point now being discussed in the way that I am now contending and asking that this Court shall determine it.

II.

The court erred in sustaining the action of the lower court, in overruling the plea of jeopardy, because the first indictment was entirely sufficient to have supported a conviction, and because, upon such indictment, the defendants were in jeopardy, and having been in jeopardy once, the Fifth Amendment to the Constitution of the United States protects them from a second accusation, and the case of Ball v. United States, 163 U. S. 662, while not on all fours with the case at bar, is an authority for our contention.

To hold otherwise is to permit the prosecuting officer, even after the expense and ordeal of a trial has been suffered by a defendant, to take a non-suit, re-shape his pleadings, and start all over again.

The case of United States v. Rogoff, 163 Fed. 312,

cited by your Honors in support of your ruling on this question, was a case somewhat dissimilar from the one at bar, in that the indictment was dismissed by the court before the cause was submitted to the jury, before any testimony was taken, or any argument of counsel was heard. In other words, the jury had merely been sworn and the case opened, while in the first trial of these defendants, all of their dilatory pleas had been passed upon, a jury had been chosen and sworn, all of the testimony had been introduced, and all of the argument of all of the counsel, both for the Government and the defendants, had taken place, save and except the concluding argument of the District Attorney, and also with the further distinction that the cause having thus for progressed and the trial having actually taken place, the defendants demanded that they have a verdict, which the court, of his own motion, denied and refused.

Again, the case cited as authority for the holding of the court is somewhat different in that it is not conceded here that the first indictment was not good. On the contrary, it is maintained that it does state an offense, to-wit, the offense of abstraction. In other words, it is not conceded by the defense that the former indictment was fatally insufficient nor is it conclusively shown by the prosecution that it was so fatally insufficient.

III.

Because the court has overlooked and failed to con-

sider the defendants' sixth assignment of error, wherein it was and is urged, that the trial court failed to charge the jury upon the case as made in the indictment, in that he authorized the jury to convict the defendants, if they believed that the defendants issued the certificate of deposit with intent to injure **or** defraud the bank, because the indictment charged such intents conjunctively and not disjunctively, and the Government having carved in its indictment and charged conjunctively, the court must follow the charge made in the indictment and a degree of proof less than that measured by the indictment would not authorize a conviction.

In other words, the court directed the jury to convict if they found that there was an intent to injure or an intent to defraud, when the indictment charged that the issuing of the certificate was done with the intent to injure and with the intent to defraud, such assignment and argument having been presented in the written brief of the plaintiffs in error, at pp. 48 to 52 inclusive.

IV.

Because the court is in error in sustaining the position of the lower court with reference to the question of venue, because the jurisdiction of the Idaho court was dependent upon the commission of the offense within its territorial limits and since the proof showed that no certificate of deposit was issued in the State of Idaho, the least that the trial court could have done was to have submitted to the jury the special instructions

requested by the defendants wherein the venue, as a question of fact, which it always is, was sought to be left to the jury.

Section 42 of the Judicial Code, which fixes a continuing jurisdiction, only applies when something is begun which is an offense and of course the handling of a blank certificate is not offensive and could not have become so in this case until the money realized therefrom, later on, failed to find its way into the bank's hands, for if it had so found its way, the implied authority of cashier S. D. Simpson was sufficient to have made the entire transaction perfectly lawful and utterly innocent.

V.

Because the court erred in paragraph 4 of its opinion wherein it denied to the defendants the right of ratification by the directors of the bank, placing such denial upon the fact that the doctrine of ratification has little application to the criminal law.

As a general proposition, the doctrine announced by the court is correct, but the trial court denied us the right to prove and denied us the right to have submitted to the jury the facts of this particular case, which would have authorized a ratification, because what was done was not criminal; that is to say, it was the contention of the defendants that cashier S. D. Simpson was issuing certificates of deposit all the time by virtue of his position, without the consent of the directors; that is,

he never, at any time, received their actual consent or agreement to the issuance of any certificate. He issued, therefore, with their implied authority, and when they afterwards found out that he had issued these certificates they were paid and taken care of in due course. He had a right, therefore, to assume that they would act the same way with reference to the certificate in question, and when he sent out a blank certificate for the purpose of securing cheaper funds for the bank, and when, afterward, that certificate came in to the bank, though in the meantime a grave error had been committed, and all of the facts became known to the directors, they then had a right to ratify what he had previously done and such ratification dated back to the time he gave out the blank, say the courts, and made legal and valid that original act. It was these very facts that the trial court refused to permit any testimony upon, and these very facts themselves are the best possible light that could be shed upon the intent of the defendants, a light, by the way, that the hesitation of the jury, all through the hours of the night, and their subsequent seeking for additional instructions from the court, upon the question of intent, shows was most necessary and humane.

In this sense, therefore, it is respectfully submitted, there could have been a ratification.

You see, may it please Your Honors, as soon as the certificate matured, and was returned to the bank for

payment, it was taken by the defendant, S. D. Simpson, to the directors and they recognized it and authorized its payment and thereupon the defendants repaid the bank this amount, together with all interest and charges thereon, and the bank never suffered, nor lost a penny.

VI.

A re-hearing should be granted herein, for the reason that the defendants', plaintiffs in error, twenty-third assignment of error, is well taken.

Inasmuch as the opinion of this Honorable Court discloses that, perhaps the Court thought that, only such errors as were presented orally are relied upon by the plaintiffs in error, it may be that the Court did not consider the assignment above mentioned. The hour granted for oral argument was insufficient in which to speak of all of the claimed errors. Certainly, however, the twenty-third assignment, which treats of the vital question of intent, is not one that was waived by the defendants, nor that should be now considered valueless.

It was solely the question of intent that turned this case. It was upon this question, may it please the Court, that the jury hesitated, and it was with reference to this question that the jury sought additional instructions. The court charged (p. 61, defendants' brief): "It is essential to guilt here, that a wrongful intent must have existed at and prior to the time the certificate was hypothecated in Kentucky" (Rec. p. 84). The defend-

ants requested a charge which in substance required that the jury must believe that there was the intent to injure and defraud at the time the certificate was issued and put forth, and of course the certificate was issued and put forth, if the indictment is to be relied upon, at the time it was handed, in its blank condition, in Idaho, by S. D. Simpson, to W. G. Simpson (Defendants' brief p. 61; Rec. p. 41). A bad intent, in Mississippi, or in Kentucky, would not satisfy the law, and of this position there can be no question whatsoever. And Sec. 1024 R. S. U. S. does not attempt to alter this position.

If, however, the jury had found such bad intent in Kentucky or Mississippi, the facts themselves would make such a finding without testimony, because the letter of W. G. Simpson, as shown in the Record (pp. 127-128) (Defendants' brief pp. 72-73), distinctly advised of the sale of the certificate and tells where the funds should be deposited, which were enclosed therewith, and this letter shows an utterly innocent intent.

The intent in this case is the body and soul of the whole matter, as said by the Supreme Court of the United States, in the Evans case.

VII.

A rehearing should be granted for the reason that the indictment charges no offense, and for the further reason that the court's charge is not responsive to the allegations in the indictment.

In the opinion of this Honorable Court, there is no treatment of that portion of our criticisms which were directed toward the insufficiency of the indictment, because the same alleged a state of facts that could have been true and at the same time could have been entirely innocent. Section 5209 does not require that the one to whom a certificate of deposit is issued shall have on deposit the amount of money called for in the certificate. Section 5209 merely provides that no certificate shall be issued or put forth without the consent of the Board of Directors. An indictment, therefore, which charges the issuing and putting forth of a certificate of deposit to W. G. Simpson when at that time the said W. G. Simpson did not have on deposit with the issuing bank an amount of money equal to the amount specified in the certificate, stated no offense, because, when one deposits money or gives a check, or gives a note for the issuing to him of a certificate of deposit, such check or note or money is not deposited with the bank in his name, nor does he really deposit such funds. He merely passes to the bank such value, which at once becomes the property of the bank, and the bank issues to him an evidence of its indebtedness to him.

In other words, it might have been entirely true, as alleged in the bill, that W. G. Simpson did not, then and there, have on deposit the amount of $2,500 with the said bank, and yet he might have paid $2,500 to the bank for the certificate of deposit. The bill, therefore,

upon its face, fails to state an offense, and a reading of the statute and of the indictment, clearly shows this.

This position was clearly set forth in defendants' tenth assignment of error, p. 52 of their brief, and was a ground of their motion to quash and of their demurrers (pp. 23-24), which motion and demurrers the court overruled (pp. 65-66). The language of the indictment is not that W. G. Simpson had not deposited that amount of money, but the language of the indictment is, that he, the said W. G. Simpson, did not, then and there, have on deposit with the said bank the said amount of money.

The trial court recognized that what we now contend for was the correct construction of the statute when he charged the jury (p. 78), but the charge of the court is not in harmony with the allegations of the indictment in this respect.

VIII.

A re-hearing should be granted for the reason that this Honorable Court erred in sustaining the position of the trial court, that it was quite unimportant whether the certificate was issued in blank or not, as complained of in the defendants' fifth assignment of error, p. 41 of their brief.

CONCLUSION.

Where the facts show beyond dispute the guilt of a person accused of crime, courts will be slow in this

day, and of right they should be, to disturb a verdict of guilty; but, where the punishment is as severe as it is in this case, and where the question of punishment or liberty depends upon the intent that nestled in the hearts of the defendants, and which could only be measured by their open, overt acts, and where the jury hesitated, as evidenced by the record in this case, even staying out through all the hours of night and in their uncertainty asking more instructions upon this identical question, and then, finally, after fourteen or fifteen hours of constant deliberation, returning a verdict and recommending, "**most earnestly**," leniency, the closest sort of scrutiny of the trial, of the charge, of the methods, of the rules, and decisions, is not only merited, but demanded in order that injustice may not result.

I therefore sincerely pray for a reconsideration and a re-hearing of this cause.

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